MONTANA'S HUMAN RIGHTS LAW
Learning the Fundamentals about Fundamental Rights

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I. INTRODUCTION – Human Rights Law - Montana Source Authorities

Human rights in Montana -- a/k/a civil rights, as commonly known at the federal level and in other jurisdictions – are recognized in a poignant and idealistic passage from our state Constitution.

Constitution of Montana -- Article II -- DECLARATION OF RIGHTS

> Section 4. Individual dignity. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

Legislatively, that idealism was given definition and a set of enforcement mechanisms in Title 49, the Montana Human Rights Act.

> "Title 49 clearly depicts the intent of the legislature....there shall be no discrimination in certain areas of the lives of Montana citizens...except under the most limited of circumstances."

Laudert v. Richland County Sheriff's Dept., 2000 MT 218, ¶ 56, quoting *Dolan v. School Dist. # 10 (1981), 195 Mont. 340, 347 (1981)*.

Organizationally, Title 49 describes the fundamental rights of every person in Chapter 1, *Basic Rights.*

Chapter 2, the *Human Rights Act*, explains what are unlawful discriminatory practices in the areas of employment, public accommodations, housing, financing, insurance, education, and the provision of governmental services or benefits, forbidding segregation or adverse treatment based on "race, creed, religion, color, national origin, age, disability, marital status, or sex." Chapter 2 also provides the remedies for enforcing those rights to be free from illegal discrimination and offers those same protections from retaliation for exercising those rights.

In Chapter 3, the *Governmental Code of Fair Practices*, Title 49 sets out a separate set of additional, affirmative duties for public agencies and public officials in our state. The provisions of the Governmental Code are mandatory, and often go beyond the laws prohibiting discrimination to legal obligations intended to prevent discrimination consistent with state policy.

Finally, in Chapter 4, *Rights of Persons with Disabilities*, Title 49 sets out a specific state policy and additional, enumerated rights for people with disabilities.

Exclusive Remedy: Title 49 establishes "the exclusive remedy for acts constituting an alleged violation of [the Governmental Code of Fair Practices] or [the Human Rights Act], including acts that may otherwise also constitute a violation of the discrimination provisions of Article II, section 4, of the Montana constitution or 49-1-102" setting forth the basic rights of Montana residents. *§49-2-512(1), MCA.* With very few exceptions, administrative procedures required by Title 49 cannot be bypassed, including the requirements to first file with the responsible state agency – the Human Rights Bureau of the Department of Labor & Industry and the requirement to file within time periods that can be as short as 180 days from the date the alleged discrimination occurred. Fundamental rights can be lost by the failure to follow Title 49 procedures. See, e.g., *Arthur v. Pierre Ltd., 2004 MT 303 (2004); Bruner v. Yellowstone County 272 Mont. 261 (1995); Fandrich v. Capital Ford Lincoln Mercury, 272 Mont. 425 (1995); Harrison v. Chance, 244 Mont. 215 (1990).* But see: *Griffith v. Butte Sch. Dist. No. 1, 2010 MT 246 (2010)* (explaining that the 2007 amendments to Title 49 may limit the broad penalizing effect of the exclusive remedy provision prior to that amendment).

The exclusive remedy of Title 49, if properly pursued, is not overridden by other state laws that may govern other aspects of the same dispute. *Great Falls Pub. Schs v. Johnson, 2001 MT 95 (2001).*

II. PROSECUTING OR DEFENDING HUMAN RIGHTS CLAIMS

For the practicing attorney - new or old, the work of recognizing, counseling or advising about human rights laws in Montana, or in prosecuting or defending or otherwise litigating human rights or civil rights claims in our state, does not occur in a vacuum.

Statutes: As with all areas of legal practice, the starting point will be the statutes themselves. Title 49, passed originally in 1974, has been amended periodically thereafter.

Administrative Rules: The provisions of Title 49 have been interpreted and implemented by administrative regulations. See Title 24, Chapter 8, §§24.8.101-24.8.767, ARM, Human Rights Bureau; Title 24, Chapter 9, §§24.9.101-24.9.1508, ARM, Human Rights Commission. These regulations have the force of law.

The Montana Supreme Court has often relied upon and upheld the binding effect and guidance provided by these regulations, particularly the rules concerning "Proof of Unlawful Discrimination," found at Rules 24.9.601 through 24.9.612, ARM (attached). See, among others: *Campbell v. Garden City Plumbing & Heating, Inc., 2004 MT 231 (2004); Shoemaker v. Denke, 2004 MT 11 (2004); Laudert v. Richland County Sheriff's Dep't, 2000 MT 218 (2000); Hafner v. Conoco, Inc., 1999 MT 68 (1999); Reeves v. Dairy Queen, 1998 MT 13 (1998).*

As Rule 24.9.601(1), ARM, "Purpose of Rules Regarding Proof of Unlawful Discrimination," explains:

> These rules regarding proof of unlawful discrimination are intended to provide general statements of what must be proved to establish unlawful discrimination in various kinds of complaints. They are not intended to be exhaustive statements of the applicable law, but general guidelines and informational summaries of the law. Practitioners appearing in cases before the commission should also refer to the statutes, the balance of the commission's rules, and the federal, state and commission decisions addressing the issues in their particular cases.

For access to Title 49, as well as links to the administrative rules, can be found at http://erd.dli.mt.gov/human-rights/montana-human-rights-laws.html. Decisions in human rights cases by the Department of Labor & Industry and by the Human Rights Commission can be accessed at http://erd.dli.mt.gov/complaint-process/decisions.html.

Human Rights Case Law: In the four decades since passage of Title 49, the Montana Supreme Court has issues a wide range of human rights decisions. A LEXIS search for cases addressing Title 49 provisions yields at least 87 decisions since 1979.

Early on, our state Supreme Court established a general principle of interpreting the Title 49 with guidance from federal civil rights statutes, regulations and case law.

> To construe this Montana statute, we look to guidance from federal discrimination law []. *McDonald v. Dept. of Envtl. Quality, 2009 MT 209, ¶ 39, n. 4, 351 Mont. 243, 214 P.3d 749; Campbell v. Garden City Plumbing & Heating, Inc., 2004 MT 231, ¶¶ 12-14, 322 Mont. 434, 97 P.3d 546; Pannoni v. Bd. of Trustees, 2004 MT 130, ¶ 28, 321 Mont. 311, 90 P.3d 438.* The Montana Legislature has indicated its clear intent that the MHRA be interpreted consistently with federal discrimination statutes and case law....We turn, therefore, to federal law and interpretation of it to inform our analysis.
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> We have relied on federal case law as well as the federal Equal Employment Opportunity Commission (EEOC) regulations and interpretive guidelines in construing Montana's discrimination laws. *Butterfield v. Sidney Pub. Schs., 2001 MT 177, ¶¶ 21, 23, 306 Mont. 179, 32 P.3d 1243; Reeves v. Dairy Queen, Inc., 1998 MT 13, ¶¶ 23-25, 287 Mont. 196, 953 P.2d 703; Hafner v. Conoco, Inc., 268 Mont. 396, 402, 886 P.2d 947, 950-51 (1994).* An interpretation of federal law by the federal agency that administers it is afforded great deference. *Sleath v. West Mont Home Health Servs., 2000 MT 381, ¶ 37, 304 Mont. 1, 16 P.3d 1042 (citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844, 104 S. Ct. 2778, 2782, 81 L. Ed. 2d 694 (1984)).*

BNSF Ry. Co. v. Feit, 2012 MT 147, ¶¶ 8-9 (2012). See also, *Walker v. MPC, 278 Mont. 344 (1996); Martinell v. Montana Power Co., 268 Mont. 292 (1994); Hearing Aid Institute v. Rasmussen, 258 Mont. 367 (1993); McCann v. Trustees, 249 Mont. 362 (1991); Snell v. MDU Co., 198 Mont. 56, 62 (1982)* ("[R]eference to pertinent federal case law is both useful and appropriate") *Martinez v. Yellowstone Cty. Welf. Dep't, 192 Mont. 42, 47 (1981)* ("A considerable body of law has developed under these federal employment discrimination acts. Due to the parallel structure of the federal laws and the Montana Human Rights Act, this Court has examined the rationale of federal case law").

There is a cautionary note. Reference to federal sources serves only as "guidance." If statutory or regulatory language or state policy differs, a distinctive Montana outcome will result. E.g., *Laudert v. Richland Cty. Sheriff, 2000 MT 218, ¶¶ 56-57 (2000)* (distinguishing, on policy grounds, between Montana vs. federal prevailing parties).

III. INTERPLAY BETWEEN MONTANA HUMAN RIGHTS LAWS AND FEDERAL CIVIL RIGHTS LAWS

As a basic approach, seeing parallels between our state's human rights laws and pertinent federal civil rights laws is, as our state Supreme Court has acknowledged, "useful and appropriate." In practice however, it can be kaleidoscopic and overwhelming. The reason is simple. The human rights protections afforded in Montana are, for the most part, stated in Chapters 2 (the Human Rights Act) and Chapter 3 (the Governmental Code of Fair Practices) of Title 49, totaling 48 pages of substantive and procedural law. Federal statutes providing civil rights protections in the same areas – employment, public accommodations, housing, financial and credit and insurance transactions, schools and education, governmental services, government licensing and regulation, public contracting and retaliation – have required scores of different federal laws and at least several hundred pages of legislation, not to mention thousands of pages of regulations and judicial decisions.

A comparison of state versus federal laws prohibiting employment discrimination illustrates the two different legal universes. Title 49 has two explicit provisions prohibiting unlawful discrimination in the workplace, Section 49-2-303 (applicable to all employers and prohibiting the denial of equal opportunity based on race, creed, religion, color, national origin, age, disability, marital status, or sex) and Section 49-3-201 (applicable to state or local government employers and providing additional protection against discrimination based on "political ideas"). At the federal level, employment discrimination by employers – limited often by size, by type of employer, by type of protection or other factors – is addressed in the Civil Rights Act of 1866 (42 USC §§ 1981 and 1983), Title VI and VII of the Civil Rights Act of 1964, the Equal Pay Act, the Age Discrimination in Employment Act, Title I of the Americans with Disabilities Act, Title IX of the Education Act of 1972, the Rehabilitation Act of 1973, the Family and Medical Leave Act, the Civil Rights Act of 1991, among others.

Those differences may seem daunting, but they also provide substantial advantages in choice of law, strategy and promotion of fundamental public policies. Federal law, even with its complexity, does provide guidance. State law does provide essential principles and perhaps even a farther reach.

A practice in human rights law in Montana is always a learning experience and a challenge. It always offer the opportunity to develop as an attorney, whether advising clients or finding innovative strategies in litigating cases. Occasionally, it also presents the chance to develop new law that promotes the fundamental right to individual dignity explicitly found in our state constitution.

TITLE 24: DEPARTMENT OF LABOR AND INDUSTRY
CHAPTER 9: HUMAN RIGHTS COMMISSION
SUB-CHAPTER 6: PROOF OF UNLAWFUL DISCRIMINATION

MONT. ADMIN. R. 24.9.601

24.9.601 PURPOSE OF THESE RULES REGARDING PROOF OF UNLAWFUL DISCRIMINATION

(1) These rules regarding proof of unlawful discrimination are intended to provide general statements of what must be proved to establish unlawful discrimination in various kinds of complaints. They are not intended to be exhaustive statements of the applicable law, but general guidelines and informational summaries of the law. Practitioners appearing in cases before the commission should also refer to the statutes, the balance of the commission's rules, and the federal, state and commission decisions addressing the issues in their particular cases.

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MONT. ADMIN. R. 24.9.602

24.9.602 MEMBERSHIP IN A PROTECTED CLASS

(1) "Membership in a protected class" means belonging to a group of persons who are afforded protection against discrimination because of race, creed, color, sex (including pregnancy), physical or mental disability, age, marital status, familial status, national origin or political beliefs or ideas as set forth in the act or code.

(2) The person alleging discrimination has the burden of proving that the charging party or other aggrieved person is a member of a protected class.

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MONT. ADMIN. R. 24.9.603

24.9.603 RETALIATION AND COERCION PROHIBITED

(1) It is unlawful to retaliate against or otherwise discriminate against a person because the person engages in protected activity. A significant adverse act against a person because the person has engaged in protected activity or is associated with or related to a person who has engaged in protected activity is illegal retaliation. "Protected activity" means the exercise of rights under the act or code and may include:

(a) aiding or encouraging others in the exercise of rights under the act or code;

(b) opposing any act or practice made unlawful by the act or code; and

(c) filing a charge, testifying, assisting or participating in any manner in an investigation, proceeding or hearing to enforce any provision of the act or code.

(2) Significant adverse acts may include the following:

(a) violence or threats of violence, malicious damage to property, coercion, intimidation, harassment, the filing of a factually or legally baseless civil action or criminal complaint, or other interference with the person or property of an individual;

(b) discharge, demotion, denial of promotion, denial of benefits or other material adverse employment action;

(c) expulsion, blacklisting, denial of privileges or access, or other action adversely affecting the availability of goods, services, facilities, or advantages of a public accommodation;

(d) eviction, denial of services or privileges, or other action adversely affecting the availability of housing opportunities; and

(e) denial of credit, financing, insurance, educational, governmental or other services, benefits or opportunities.

(3) When a respondent or agent of a respondent has actual or constructive knowledge that proceedings are or have been pending with the commission or in court to enforce a provision of the act or code, significant adverse action taken by respondent or the agent of respondent against a charging party or complainant while the proceedings were pending or within six months following the final resolution of the proceedings will create a disputable presumption that the adverse action was in retaliation for protected activity.
(History: Sec. 49-2-204, 49-3-106 MCA; IMP, 49-2-301, 49-3-209 MCA; NEW, 1996 MAR p. 2871, Eff. 10/25/96.)

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MONT. ADMIN. R. 24.9.604

24.9.604 DISCRIMINATION PROHIBITED - EMPLOYMENT

(1) Except as provided in 49-2-303, 49-2-308 and 49-3-201 MCA, it is unlawful for an employer, agent of an employer, employment agency or labor organization to discriminate against a person in the terms, conditions or privileges of employment because of a person's

membership in a protected class.

(2) Terms, conditions or privileges of employment which are subject to the act and code include:

(a) recruitment, advertising and job application procedures;

(b) hiring, promotion, upgrading, award of tenure, transfer, layoff, discipline, discharge, termination of employment, right to return from layoff, and rehiring;

(c) rates of pay or compensation and changes in compensation;

(d) job assignments, job classifications, organizational structures, position descriptions, lines of progression and seniority lists;

(e) leaves of absence, sick leave or any other leave;

(f) fringe benefits available through employment, whether or not administered by the employer;

(g) selection and financial support for training, including apprenticeships, professional meetings, conferences or other related activities;

(h) social and recreational activities sponsored by an employer, agent of an employer, employment agency or labor organization; and

(i) any other term, condition or privilege of employment.

(3) Examples of practices which may constitute unlawful employment discrimination include the following:

(a) denying, qualifying, or limiting a term, condition, or privilege of employment because of a person's membership in a protected class or protected activity;

(b) subjecting a person to harassment in the workplace because of the person's membership in a protected class or protected activity;

(c) failing to make reasonable accommodation as further explained in ARM 24.9.606 and 24.9.608;

(d) segregating or classifying a person in a way that adversely affects employment status or opportunities because of membership in a protected class;

(e) participating in a contract or other arrangement (including an arrangement with an organization providing fringe benefits or an organization providing training or apprenticeship programs) that has the effect of discriminating against persons in the terms, conditions or

privileges of employment because of membership in a protected class;

(f) using standards, criteria or methods of administering or managing employment opportunities which discriminate in the terms, conditions or privileges of employment because of membership in a protected class or which perpetuate the denial of equal employment opportunities because of membership in a protected class;

(g) using or administering qualification standards, employment tests or other selection criteria that screen out or tend to screen out members of a protected class; and

(h) discriminating against a person in the terms, conditions or privileges of employment because the person has a relationship with or otherwise associates with a member of a protected class.

(History: Sec. 49-2-204, 49-3-106 MCA; IMP, 49-2-303, 49-2-308, 49-3-201, and 49-2-202 MCA; NEW, 1996 MAR p. 2871, Eff. 10/25/96.)

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MONT. ADMIN. R. 24.9.605

24.9.605 EMPLOYMENT DISCRIMINATION: REASONABLE DEMANDS/BONA FIDE OCCUPATIONAL QUALIFICATION EXCEPTIONS

(1) It is not unlawful employment discrimination to make a distinction based on age, physical or mental disability, marital status, or sex when the reasonable demands of the position or program require the distinction.

(2) The commission construes the exceptions contained in this rule strictly, against allowing the exception.

(3) The commission construes the statutory exception permitting distinctions based on age, marital status and sex in accordance with the legal standards for "bona fide occupational qualifications" under section 703(e) (1) of the Civil Rights Act of 1964 *(42 U.S.C. 2000-2*(e) (1)) and section 4(f) of the Age Discrimination in Employment Act of 1967 *(29 U.S.C. 623*(f)).

(4) The commission construes the statutory exception permitting distinctions based on physical or mental disability in accordance with the legal standards for determining whether a person is a "qualified individual with a disability" under section 101(8) of the Americans with Disabilities Act of 1990 *(42 U.S.C. 12111*(8)).

(5) These exceptions are affirmative defenses. A respondent claiming an exception has the burden of proof on the issue.

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MONT. ADMIN. R. 24.9.606

24.9.606 FAILURE TO MAKE REASONABLE ACCOMMODATION - EMPLOYMENT DISCRIMINATION BECAUSE OF A DISABILITY

(1) It is an unlawful discriminatory practice for an employer, agent of an employer, employment agency or labor organization to:

(a) fail to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified employee, employment applicant or union member with a physical or mental disability unless it can demonstrate that the accommodation would impose an undue hardship on the operation of the business in question; or

(b) deny equal employment opportunities to a person with a physical or mental disability because of the need to make a reasonable accommodation to the person's disability so that the person can perform the essential functions of an employment position.

(2) A person with a physical or mental disability is qualified to hold an employment position if the person can perform the essential functions of the job with or without a reasonable accommodation for the person's physical or mental disability. If an employer has prepared a written description before advertising or interviewing applicants, the description is evidence of the essential functions of the job.

(3) "Reasonable accommodation" to a person with a physical or mental disability for the purposes of enabling the person to perform the essential functions of an employment position may include:

(a) making existing facilities used by employees readily accessible to and usable by individuals with physical or mental disabilities; and

(b) job restructuring, part-time or modified work schedules, reassignment to vacant positions which the employee is qualified to hold, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations or training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with physical or mental disabilities.

(4) An accommodation to a person with a physical or mental disability for the purpose of enabling the person to perform the essential functions of an employment position is reasonable unless it would impose an undue hardship upon the employer.

(5) For purposes of determining whether an accommodation to a physical or mental disability is

reasonable, "undue hardship" means an action requiring significant difficulty or extraordinary cost when considered in light of:

(a) the nature and expense of the accommodation needed;

(b) the overall financial resources of the facility or facilities involved in the provision of the accommodation, the number of persons employed at the facility, the effect on expenses and resources of the facility, and other impacts of the accommodation on the operation of the facility;

(c) the overall financial resources of the business, the overall size of the business of the employer with respect to the number of employees, and the number and type and location of the facilities of the employer; and

(d) the type of operation or operations of the employer, including composition, structure, and functions of the work force of the employer, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the employer.

(6) An accommodation to a person with a physical or mental disability for the purpose of enabling the person to perform the essential functions of an employment position is not reasonable if it would endanger the health or safety of any person.

(7) If an employer defends an adverse employment action against a person with a physical or mental disability on the grounds that an accommodation would endanger the health or safety of a person, the employer's failure to independently assess whether the accommodation would create a reasonable probability of substantial harm will create a disputable presumption that the employer's justification is a pretext for discrimination on the basis of disability.

(8) Independent assessment of the risk of substantial harm is evaluation by the employer of the probability and severity of potential injury in the circumstances, taking into account all relevant information regarding the work and medical history of the person with the disability before taking the adverse employment action in question.

(History: Sec. 49-2-204, 49-3-106 MCA; IMP, 49-2-101(15), 49-3-101(3), 49-3-210, and 49-3-202 MCA; NEW, 1996 MAR p. 2871, Eff. 10/25/96.)

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MONT. ADMIN. R. 24.9.607

24.9.607 PROHIBITED MEDICAL EXAMINATIONS AND INQUIRIES - EMPLOYMENT DISCRIMINATION BASED ON DISABILITY

(1) An employer, agent of an employer, employment agency or labor organization shall not

require medical examinations or make inquiries of employees for the purposes of determining whether an employee has a physical or mental disability or to determine the nature or severity of a disability unless the examination or inquiry is shown to be job-related and consistent with business necessity.

(2) Use of an employment application form or process which requires a medical examination or makes an inquiry of a job applicant for the purpose of determining whether a person has a physical or mental disability or to determine the nature or severity of a physical or mental disability prior to an offer of employment constitutes a violation of 49-2-303(1) (c) MCA and is evidence of a violation of 49-2-303(1) (a) MCA unless the form or process complies with the requirements of this rule.

(3) An employer, agent of an employer, employment agency or labor organization may make pre-employment inquiries into the ability of an applicant to perform job-related functions.

(4) An employer, agent of an employer, employment agency or labor organization may require a medical examination of a person after an offer of employment has been made and prior to the commencement of the employment duties and may condition the offer of employment on the results of the examination if:

(a) all entering employees or union members in the same job category are subjected to the same examination regardless of disability;

(b) information obtained regarding the medical condition or history of a person is treated as a confidential medical record; and

(c) information obtained is collected and maintained in accordance with the requirements of the Americans with Disabilities Act (ADA) where the employer, employment agency or labor organization is subject to ADA requirements.

(5) An employer, agent of an employer, or labor organization may conduct voluntary medical examinations, including voluntary medical histories, that are part of a bona fide employee or union health program. Information obtained pursuant to a bona fide employee or union health program is a confidential medical record and subject to the same confidentiality requirements and restrictions on disclosure stated in (4).

(6) An employer, after a conditional offer of employment to a prospective employee, may inquire whether the prospective employee is certified or eligible to be certified as vocationally handicapped for the purposes of the subsequent injury fund, pursuant to T. 39, ch. 71, pt 9 of the Mont. Workers' Compensation Act.

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MONT. ADMIN. R. 24.9.608

24.9.608 FAILURE TO ACCOMMODATE - EMPLOYMENT DISCRIMINATION BASED ON RELIGION

(1) It is an unlawful discriminatory practice for an employer, an agent of an employer, an employment agency or a labor organization to discriminate against a person in the terms, conditions or privileges of employment because of religion.

(2) The term religion includes all aspects of religious observance, practice and belief.

(3) For purposes of providing equal employment opportunities, an employer has a duty to accommodate an employees religion unless to do so would cause a more than de minimis hardship on the conduct of the business.

(a) An employee whose religion conflicts with an employment requirement has a duty to inform the employer of the conflict in a timely manner.

(b) Once informed of a religion based conflict, an employer has a duty to initiate good faith efforts to accommodate the conflict. An employer can demonstrate that an accommodation to an employees religious belief or practice would cause a more than de minimis hardship with proof that the accommodation would require a significant cost to the business, would violate contract obligations which cannot be reconciled, or would otherwise cause a more than de minimis hardship to the employer.

(c) The employer and the employee have a mutual obligation to engage in bilateral cooperation in a search for a reasonable resolution of conflicts which may arise between an employer's business and an employee's religion.

(4) Determining whether an accommodation can be made and whether a more than de minimis hardship would occur for purposes of the provisions of the act or code prohibiting religious discrimination in employment must be made on a case by case basis.

(History: Sec. 49-2-204, 49-3-106 MCA; IMP, 49-2-303, 49-3-201, and 49-3-202 MCA; NEW, 1996 MAR p. 2871, Eff. 10/25/96.)

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MONT. ADMIN. R. 24.9.609

24.9.609 DISCRIMINATION PROHIBITED - PUBLIC ACCOMMODATION

(1) Except as provided in 49-2-304 MCA it is unlawful for an owner, lessee, manager, agent or employee of a public accommodation to deny equal access to services, goods, facilities, advantages or privileges to a person because of membership in a protected class.

(2) Unlawful discrimination in a public accommodation may include the following:

(a) imposing or applying qualification standards, admittance tests or other selection criteria that screen out or tend to screen out a person or persons who are members of a protected class unless the standard, test or other selection criteria can be shown to be necessary for the provision of the goods, services, facilities, advantages or privileges being offered;

(b) denying equal access to the goods, services, facilities, advantages or privileges of a public accommodation to a person because of the person's relationship or association with a member of a protected class; or

(c) subjecting a member of the public or patron to harassment in the public accommodation because of the person's membership in a protected class or protected activity.

(3) Unlawful discrimination against a person with a disability in a public accommodation may include:

(a) failing to make reasonable modifications in policies, practices or procedures when the modifications are necessary to afford the goods, services, facilities, advantages or privileges to persons with disabilities unless the public accommodation can demonstrate that making the modifications would fundamentally alter the nature of its goods, services, facilities, advantages or privileges;

(b) failing to take necessary action to ensure that a person with a disability is not excluded, denied services, segregated or otherwise denied equal access because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, advantages or privileges being offered or would result in an unreasonable expense or undue burden after considering the circumstances of the public accommodation;

(c) failing to remove architectural barriers and communication barriers in existing facilities that are structural in nature and deny equal access to persons with disabilities when the removal is readily achievable; or

(d) failing to make goods, services, facilities, advantages and privileges available through alternative methods if removal of barriers that deny equal access to persons with disabilities is not readily achievable.

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MONT. ADMIN. R. 24.9.610

24.9.610 BURDEN OF PROOF - DISPARATE TREATMENT

(1) To prove a claim of unlawful discrimination or illegal retaliation based on disparate treatment, a charging party must establish a prima facie case in support of the alleged violation of the act or code.

(2) A prima facie case of discrimination or retaliation based on disparate treatment means evidence from which the trier of fact can infer that adverse action against the charging party was motivated by respondent's consideration of charging party's membership in a protected class, protected activity, or association with or relation to a person who is a member of a protected class or who has engaged in protected activity.

(a) The elements of a prima facie case will vary according to the type of charge and the alleged violation, but generally consist of proof:

(i) That charging party is a member of a protected class or engaged in protected activity;

(ii) That charging party sought and was qualified for an employment, housing, service, credit or other opportunity made available by the respondent; and

(iii) That charging party was denied the opportunity, or otherwise subjected to adverse action by respondent in circumstances raising a reasonable inference that charging party was treated differently because of membership in a protected class or because of protected activity.

(b) Examples of evidence establishing a reasonable inference that charging party was treated differently because of membership in a protected class or because of protected activity include:

(i) proof that respondent continued to make the employment, housing, service, credit, or other opportunity available to persons who are not members of the same protected class as charging party;

(ii) proof that similarly situated persons outside the protected class were treated more favorably;

(iii) proof that there was a close proximity in time between protected activity of the charging party and adverse action by the respondent;

(iv) proof that respondent intended to discriminate against persons of the protected class; or

(v) other proof that there is a causal connection between adverse action by the respondent and the charging party's membership in a protected class or protected activity.

(3) Once a charging party establishes a prima facie case of unlawful discrimination or illegal retaliation based on circumstantial evidence of disparate treatment, the respondent for the challenged action.

(4) If a respondent produces evidence of a legitimate, nondiscriminatory reason for a challenged action in response to a prima facie case, the charging party must demonstrate that the reason offered by the respondent is a pretext for unlawful discrimination or illegal retaliation. The charging party can prove pretext with evidence that the respondent's acts were more likely based on an unlawful motive or indirectly with evidence that the explanation for the challenged action is not credible and is unworthy of belief.

(5) If a charging party has established a prima facie case with direct evidence of unlawful discrimination or illegal retaliation, the respondent must prove by a preponderance of the evidence that an unlawful motive played no role in the challenged action or that the direct evidence of discrimination is not credible and is unworthy of belief.

(History: Sec. 49-2-204, 49-3-106 MCA; IMP, 49-2-101, 49-2-303, 49-2-304, 49-2-305, 49-2-306, 49-2-307, 49-2-308, 49-2-403, 49-3-101, 49-3-103, 49-3-104, 49-3-201, 49-3-202, 49-3-203, 49-3-204, 49-3-205, 49-3-206, 49-3-207, and 49-3-208 MCA; NEW, 1996 MAR p. 2871, Eff. 10/25/96.)

TITLE 24: DEPARTMENT OF LABOR AND INDUSTRY
CHAPTER 9: HUMAN RIGHTS COMMISSION
SUB-CHAPTER 6: PROOF OF UNLAWFUL DISCRIMINATION

MONT. ADMIN. R. 24.9.611

24.9.611 BURDEN OF PROOF - MIXED MOTIVE CASE

(1) When the charging party proves that the respondent engaged in unlawful discrimination or illegal retaliation but the respondent proves the same action would have been taken in the absence of the unlawful discrimination or illegal retaliation, the case is a mixed motive case. In a mixed motive case, the commission will order respondent to refrain from the discriminatory conduct and may impose other conditions to minimize future violations, but the commission will not issue an order awarding compensation for harm to the charging party caused by an adverse action that would have been taken by the respondent regardless of an unlawful discriminatory or retaliatory motive.

TITLE 24: DEPARTMENT OF LABOR AND INDUSTRY
CHAPTER 9: HUMAN RIGHTS COMMISSION
SUB-CHAPTER 6: PROOF OF UNLAWFUL DISCRIMINATION

MONT. ADMIN. R. 24.9.612

24.9.612 BURDEN OF PROOF - DISPARATE IMPACT

(1) To prevail on a claim of unlawful discrimination based on disparate impact, a charging party must establish a prima facie case by proving that one or more identified practices or policies of the respondent have a significant or substantial adverse effect on the charging party's protected class.

(2) Evidence of a respondent's intent to discriminate against members of a protected class is not required to establish a prima facie case of unlawful discriminatory practice based on disparate impact.

(3) Once a charging party establishes a prima facie case of unlawful discrimination based on a charge of disparate impact, the respondent must produce evidence of a legitimate business justification for the challenged practices or policies. Proof of a legitimate business justification requires admissible evidence that the challenged practices or policies are job-related and consistent with business necessity.

(4) If a respondent produces admissible evidence of a legitimate business justification for a challenged business practice or policy, the charging party must prove that the articulated justification offered by the respondent is a pretext for unlawful discrimination. The charging party may prove pretext directly with evidence that an unlawful motive more likely motivated the respondent, or indirectly with evidence that the articulated business justification is not worthy of belief or that there are other practices or policies available which are equally effective in serving the legitimate business interests of the respondent which do not have similar discriminatory effects upon members of a protected class.